**UNITED STATES DISTRICT COURT**
**FOR THE SOUTHERN DISTRICT OF NEW YORK**

THE PRINCERIDGE GROUP LLC,

Plaintiff,

-against-

OPPIDAN, INC.,

Defendant.

Case No. 11 CV 1460 (AJN)

Civil Action

# MEMORANDUM OF LAW ON BEHALF OF THE PRINCERIDGE GROUP LLC IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Leo V. Leyva
Jed M. Weiss
Cole, Schotz, Meisel,
Forman & Leonard, P.A.
A Professional Corporation
900 Third Avenue
16th Floor
New York, NY 10022-4728
212.752.8000
212.752.8393 (fax)
Attorneys for Plaintiff The PrinceRidge Group LLC

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## **PRELIMINARY STATEMENT**[1]

Defendant Oppidan Inc.'s ("Oppidan" or "Defendant") motion for summary judgment is based on an intentional misapplication of New York law regarding whether a "finder," such as Plaintiff, The PrinceRidge Group LLC ("PrinceRidge"), is entitled to a fee for financial advisory services provided to defendant Oppidan, Inc. ("Oppidan"). The New York Court of Appeals has already determined that the answer is a resounding "yes". Accordingly, Oppidan is **not** entitled to summary judgment.

The record makes clear that PrinceRidge was, at all relevant times, a financial services firm providing financial advisory services to Oppidan. Kirsch Decl. ¶ 2. New York case law is clear that PrinceRidge, a FINRA licensed broker/dealer[2], does not require a real estate broker's license to prevail on its breach of contract claim because, in providing its financial advisory services to Oppidan, PrinceRidge did not act as a real estate broker.

For obvious reasons, Oppidan does not dispute that PrinceRidge fulfilled its obligations under the Exclusive Engagement Agreement. Rather, Oppidan seeks to exploit a "loophole" to avoid paying PrinceRidge its contractually entitled fee. The undisputed material facts demonstrate, however, that PrinceRidge performed under the Exclusive Engagement Agreement and is entitled to be compensated. In fact, the record establishes that *Oppidan*, not PrinceRidge, breached the Exclusive Engagement Agreement mandating a denial of Oppidan's motion for summary judgment.

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[1] All defined terms herein shall have the meaning ascribed to them in PrinceRidge's motion for summary judgment.

[2] Attached to the Declaration of Jeff Silberman in Opposition to Oppidan's Motion for Summary Judgment ("Silberman Decl") (PrinceRidge's General Counsel) as Exhibit "A" are true and accurate copies of PrinceRidge's relevant FINRA Membership Agreements.

Furthermore, Oppidan's deceitful actions surrounding its failure to pay PrinceRidge for the services it rendered in accordance with the Exclusive Engagement Agreement warrant denial of Oppidan's motion for summary judgment with respect to the implied covenant of good faith and fair dealing claim. Oppidan's own motion confirms that Oppidan would rather advance flawed legal arguments in an effort to delay its payment obligations to PrinceRidge for the services PrinceRidge provided, which resulted in a $100 million acquisition of Oppidan's distressed assets. Oppidan's continued refusal to compensate PrinceRidge is clearly evidence of its bad faith.

## STATEMENT OF FACTS

PrinceRidge relies on the Statement of Additional Material Facts submitted herewith as well as the Statement of Undisputed Material Facts that were submitted in Support of its Motion for Summary Judgment.

## LEGAL ARGUMENT

### I. PRINCERIDGE DID NOT ACT AS A BROKER AND, THEREFORE, OPPIDAN'S MOTION FOR SUMMARY JUDGMENT MUST BE DENIED.

The documents and sworn deposition testimony confirm that PrinceRidge did not act as a "real estate broker" in performing its financial advisory services for Oppidan pursuant to the Exclusive Engagement Agreement. It is incredulous for Oppidan to now argue otherwise after they knowingly engaged PrinceRidge, a known investment bank, for its advisory services. Oppidan attempts to rely on New York Real Property Law Section 442-d for its mistaken proposition that in order to receive compensation under the Exclusive Engagement Agreement, PrinceRidge must be a licensed real estate broker. (Def. Br., p. 6.) Section 442-d, however, does not apply to the facts here, where PrinceRidge acted as a "finder," not a "broker" with respect to the Properties. See Northeast Gen. Corp. v. Wellington Adv., infra, 82 N.Y.2d 158 (Ct. App. 1993).

PrinceRidge's work pursuant to the Exclusive Engagement Agreement consisted of, among other things, **finding** prospective investors who may be willing to invest in a transaction involving a portfolio of distressed real estate, and introduce those investors to the transaction. Following the introduction, PrinceRidge played absolutely no part in Oppidan's negotiations with the prospective investors. PrinceRidge did not have the authority to, nor did it, negotiate a sale of any of Properties for Oppidan. Other than the requisite introductions contemplated by the parties agreement, PrinceRidge took no further action of any nature as it pertained to the sale of the Properties. Kirsch Decl. ¶ 36. Simply stated, PrinceRidge was not Oppidan's "agent," which is the critical determination of whether a person or entity is acting as a "broker." See id.; Feldbau v. Klarnet, 109 Misc.2d 32, 35-36 (Queens 1981), infra. Under these material facts, Oppidan's motion for summary judgment must be denied.

### A. Oppidan Misapplies New York Law in an Attempt to Justify its Breach of the Exclusive Engagement Agreement.

New York law has long distinguished "finders" and "brokers" in real estate transactions. See Northeast Gen. Corp., 82 N.Y.2d at 162-63 ("a finder is **not** a broker, although they perform some related functions."); Train v. Ardshiel Assoc., Inc., 635 F.Supp. 274, 279 (S.D.N.Y. 1986) ("The distinction is that finders do not have to negotiate the transaction to earn their fee"). "Distinguishing between a broker and finder involves an evaluation of the quality and quantity of services rendered." Northeast Gen. Corp., 82 N.Y.2d at 162-63. A "finder" has the responsibility to find potential buyers or sellers and bring parties together; a finder has no obligation or authority to actually negotiate the transaction. Northeast Gen. Corp., 82 N.Y.2d at 163. Essentially, a finder completes his work merely by facilitating the exchange of information between two parties, which exchange results in the parties entering into negotiations to consummate a deal. Id. Minichiello v. Royal Bus. Funds Corp., 18 N.Y.2d 521, 527 (Ct. App. 1966), cert. denied 389 U.S. 820 (1967) (holding that it is possible for a finder to accomplish his service by making only two phone calls and, if the parties later conclude a deal, the finder is entitled to compensation).

Brokers, on the other hand, have far greater involvement in the ultimate transaction, and are required to act as "an intermediary between two parties in bringing about a contractual meeting of the minds." Polo v. Lordi, 261 N.Y. 221, 224 (Ct. App. 1933). The role of a broker (unlike a finder), "carries a defined fiduciary duty to act in the best and more involved interests of the principal." Northeast Gen. Corp., 82 N.Y.2d at 163. Finders, on the other hand, do not inherently owe their clients a fiduciary duty, and as such, they are not required to maintain a license in order to receive payment for their services. Id. ("The finder is required to introduce and bring the parties together, without any obligation or power to negotiate the transaction, in order to earn the finder's fee.") The New York Court of Appeals explained that, in addition to the nomenclature of "finder" or "broker" used in an agreement, to determine whether a fiduciary duty is owed to their clients, courts should look to the scope of the services agreed to in writing between the parties. Id.

Here, PrinceRidge's role under the Exclusive Engagement Agreement was limited to acting as Oppidan's "exclusive advisor." The terms of the Exclusive Engagement Agreement were the direct result of the services provided to Oppidan by PrinceRidge Managing Director Matthew Kirsch. Kirsch participated in a number of conference calls with Oppidan President Joe Ryan, so as to allow PrinceRidge to familiarize itself with Oppidan's business and determine the scope of services required by Oppidan. Thereafter Kirsch met with Ryan in an effort to learn about Oppidan and discuss the engagement. Ryan Dep. 34-35; Kirsch Dep 1 pp. 86 – 87. Those discussions revealed three potential methods of resolving the financial issues Oppidan faced at that time: 1) refinancing the existing debt on the Properties; 2) renegotiating the loans on the Properties with existing lenders; or 3) the disposition of the Properties through sales by Oppidan. (See Kirsch I 16 – 17:18 - 5, 42:15-20; Ryan Dep. 34 – 35.) Ultimately it was determined that the third option, a sale of the Properties by Oppidan, was the best course of action. Ryan Dep. 35:14-15.

PrinceRidge's responsibilities under the Exclusive Engagement Agreement were set forth as follows:

> (i) in connection with [Oppidan], familiarize itself with the properties, business, operations, financial condition, management and prospects of the portfolio (the "Assets");
>
> (ii) introduce [Oppidan] to potential buyers of the Assets; and
>
> (iii) provide such other advisory and investment banking services upon which the parties may mutually agree.
>
> [Exclusive Engagement Agreement ¶ 1(b), Exhibit E to Kirsch Decl.]

The language set forth above, as well as the balance of the Exclusive Engagement Agreement, is remarkably different from that contained in Oppidan's agreements with actual real estate brokers engaged by Oppidan (the "Brokerage Agreements"). First, each of the Brokerage Agreements define the party Oppidan is hiring as a "**broker**." Not one of them identifies the party that Oppidan is retaining as an "advisor". See Kirsch Decl. ¶ 33, Exhibit R.

Second, each of the Brokerage Agreements state that Oppidan "employs Broker as its exclusive agent to procure purchasers for [a property]. Broker is authorized to sell the [property]. . ." Id. None of this critical language applicable to brokerage agreements entered into by Oppidan, appears in the Exclusive Engagement Agreement with PrinceRidge. Kirsch

Decl. ¶ 34, Exhibit E. In fact, as both parties are aware, PrinceRidge did not have such authority and never sought such authority since it was acting merely in an advisory capacity to Oppidan.

Third, each of the Brokerage Agreements describes the broker's fee as a "commission" and is a simple calculation of purchase prince multiplied by a rate. This is unlike the more comprehensive compensation structure provided to PrinceRidge under the Exclusive Engagement Agreement, which defines PrinceRidge's fee as "compensation." See Kirsch Decl. ¶ 35, Exhibits R and E. Despite what Oppidan now argues, the terms compensation and commission are not synonymous and have very different meanings. Webster's dictionary defines "commission" as "a fee paid to an agent or employee for transacting a piece of business or performing a service." See Merriam-Webster Dictionary, http://www.merriam-webster.com/dictionary/commission; Kirsch Decl. ¶ 35. The critical language in that definition, of course, is, "transacting a piece of business." Here, as discussed above, the Exclusive Engagement Agreement does not authorize PrinceRidge to "transact" anything. PrinceRidge **did not** have the authority to negotiate anything with any of the prospective investors, nor did PrinceRidge have the authority to bind Oppidan to a contract. See Kirsch Decl. ¶ 36. In fact, after PrinceRidge's opening with prospective investors, Oppidan went to great lengths to ensure that PrinceRidge was not a part of the actual negotiations. The Exclusive Engagement Agreement is clear that the principle task PrinceRidge was asked to perform was to identify potential buyers, introduce them to the Transaction, and perform other advisory or investment banking services as may be mutually agreed upon. Unlike a broker, PrinceRidge was **not** involved whatsoever in the negotiation of the Transaction. Kirsch Dep. I 163:9-16. PrinceRidge was retained to provide financial advisory services only. PrinceRidge is licensed by FINRA to do so (see Silberman Decl. Exhibit "A"), and did not require a real estate broker's license here.

Finally, the compensation language of the Exclusive Engagement Agreement confirms that Oppidan intended to pay PrinceRidge for advisory services it rendered, and not merely for "brokerage services". For PrinceRidge's service, the compensation under the Exclusive Engagement Agreement was specifically structured so that PrinceRidge would still be compensated for its advisory work performed even if Oppidan chose to engage an actual real estate broker to market the Properties and not use PrinceRidge as its finder. Paragraph 3(b) of the Exclusive Engagement Agreement states:

> If prior to the Termination Date, [Oppidan] decides to remove a property from the portfolio and sell it, [Oppidan] shall pay to PrinceRidge a fee in an amount of $50,000 per property. If the property is the Palm Beach location, the fee due will be $125,000. If the property is the Madison WI, Ocala, FL, or Bowling Green, KY location, the fee due will be $75,000.

Accordingly, by entering into the Exclusive Engagement Agreement, which was negotiated and reviewed by Oppidan's internal legal counsel, Oppidan acknowledged that the services PrinceRidge intended to provide were substantial even absent the identification and introduction of a company to the transaction. This type of language would **never** appear in a brokerage agreement, certainly not the ones provided by Oppidan here.

PrinceRidge fulfilled its obligations under the Exclusive Engagement Agreement when, after it introduced National Retail Properties ("NRP") to the transaction, NRP purchased ten (10) of the Properties from Oppidan. Following this introduction, PrinceRidge stepped away from the matter, and it had no involvement in the negotiation, sale, or purchase of the Properties. See Kirsch Decl. ¶ 36. Its involvement ended immediately after it introduced NRP to the transaction. As such, PrinceRidge is not seeking a "commission" for services rendered as a broker under Section 442-d, rather, it is seeking its contractually entitled "Success Fee."

Oppidan's reliance on Feldbau v. Klarnet is misplaced. In Feldbau, the plaintiff-finder purchased real estate with the intent of selling it to the defendant for a fee. 109 Misc.2d at 35-36. Plaintiff subsequently assigned his rights to the property to defendant and thereafter sought a "finder's fee" for his efforts. The Court concluded that plaintiff was not entitled to a fee for his services under Section 442-d, regardless of the fact that he called the fee a "finder's fee," because plaintiff there "did not act as a principal; he acted as an agent [for defendant]." Id. Plaintiff was the actual party who negotiated with the seller and sought to purchase the property on behalf of defendant. Id. As such an agent, he fell within the confines of Section 442-d and needed a real estate broker's license to receive a fee for his services. Id. Here, again, PrinceRidge did none of the negotiating for the Transactions, it was not even allowed to participate in negotiations under the Exclusive Engagement Agreement. Furthermore, Feldbau is clearly distinguishable from this matter as PrinceRidge never purchased any property for the benefit of Oppidan. Accordingly, Feldbau does not support Oppidan's argument.

Oppidan's reliance on Levinson v. Genessee Assocs. is even more misplaced. In Levinson, the court considered cross-motions for summary judgment to determine whether plaintiff (a licensed real estate salesperson) was barred from recovering a fee from the purchaser of a commercial building. 172 AD.2d 400, 401 (1st Dept. 1991). The Court granted defendant's motion for summary judgment based on Section 442-a of the Real Property Law, finding that plaintiff was not entitled to a fee for her services, which were labeled in her engagement agreement as "consulting." Id. The Court found that "[t]he fact that plaintiff chose to label her activities in connection with such sale as "consulting" is not determinative." Id. The Court reasoned that the *substance* of her activities showed that she did nothing more than facilitate a purchase of real property. Id. In other words, again, the Plaintiff in Levinson was involved in the negotiation of the property, unlike PrniceRidge here. Kirsch Decl. ¶¶ 10-11, 36; Kirsch Dep. I, 102:23-103:12, 163:9-15, 195:6-196:20.

Oppidan relied on Levinson for the proposition that the description of the fee in the Exclusive Engagement Agreement as a "Success Fee," is not determinative. (Def. Br., p. 10.) PrinceRidge does not contend its fee was *not* a broker fee merely because it is "labeled" a "Success Fee" in the Exclusive Engagement Agreement. Rather, like in Levinson, it is the substance of PrinceRidge's work that is determinative of the fact that it acted in an advisory role to Oppidan, and did **not** perform the functions of a broker. PrinceRidge did not have the authority to negotiate the deal between Oppidan and NRP regarding the Properties, nor did it have any power to bind Oppidan. Kirsch Decl. ¶ 36. PrinceRidge's power under the Exclusive Engagement Agreement was limited to introducing investors to the transaction, and nothing more. Kirsch Decl. at ¶ 36; Kirsch Dep. I 163:9-16. As such, in multiple ways, Levinson simply does not support Oppidan's argument.

These cases clearly do not support Oppidan's motion for summary judgment because: 1) the Exclusive Engagement Agreement confirms that PrinceRidge was engaged to provide "advisory services" to Oppidan, **not** brokerage services; and 2) irrespective of the "advisory services" label, the *substance* and *quality* of PrinceRidge's work was that of a finder, not a broker. Moreover, unlike the plaintiff in Feldbau, PrinceRidge was not Oppidan's agent and did not have any involvement in the negotiations surrounding NRP's purchase of the Properties. Therefore, Section 442-d does not apply to PrinceRidge's "finder" services, and PrinceRidge is contractually entitled to a fee for the successful completion of its services.

The facts here are strikingly similar to the plaintiff-finder in Northeast Gen. Corp. 82 N.Y.2d at 162-63. In Northeast Gen. Corp., plaintiff-finder Northeast Gen. Corp. had a written agreement with its client, Wellington, pursuant to which Northeast was entitled to a "Completion Fee" when a transaction closed between Wellington and any party "introduced and/or presented by [Northeast] to [Wellington]." Id. at 160-61. "By its terms, the understanding between these parties called for a simple service: the finder was to introduce purchaser "candidates" to Wellington for which the finder would be paid a finder's fee if a completed transaction ensued." Id. at 161. Northeast brought Wellington a potential purchaser with whom Wellington ultimately entered into a purchase agreement. Id. Wellington failed to pay the Completion Fee, and Northeast sued to recover its fee. Id. The trial court initially found in favor of Northeast, but on Wellington's motion, it set aside the verdict "based on a newly notched fiduciary-like duty on finders." Id. The Appellate Division affirmed, and the Court of Appeals reversed, finding that Northeast's representative acted in "a traditional finder function under a finder's agreement, and his role ceased when he found and presented someone." Id. at 162.

The **New York Court of Appeals** has explained that "a finder is not a broker." Id. (emphasis added). The Court found that Northeast was a finder, explaining: "this finder had no explicit or implied power to bind Wellington. This finder did not have the power to negotiate the transaction. This finder did not have the power to do anything except find and introduce prospects." Id. at 164. Based on this reasoning, the Court of Appeals concluded that Northeast was not a broker and did not owe a fiduciary duty to Wellington. Id. at 164 Therefore, there was no basis upon which Wellington could rightfully withhold Northeast's finder's fee. Id. at 164-165.

Similarly, here, PrinceRidge is contractually entitled to a fee for its "Advisory Services," which include the limited role of contacting and introducing Oppidan to prospective buyers of the Properties. (See Exclusive Engagement Agreement, p. 1-2.) PrinceRidge earned its Success

Fee when it contacted and introduced NRP to the transaction, and NRP subsequently purchased ten (10) of the Properties. Id.; Northeast Gen. Corp., 82 N.Y.2d at 163. Like the plaintiff in Northeast Gen. Corp. v. Wellington, PrinceRidge did not have the authority to negotiate the deal between Oppidan and NRP regarding the Properties. Kirsch Decl. ¶ 36; Northeast Gen. Corp., 82 N.Y.2d at 164. PrinceRidge also did not have any power to bind Oppidan. Kirsch Decl. at ¶ 36; Northeast Gen. Corp., 82 N.Y.2d at 164. PrinceRidge's power under the Exclusive Engagement Agreement was limited to introducing investors to the transaction, that is it. Kirsch Decl. at ¶ 36; Kirsch Dep. I 163:9-16; Northeast Gen. Corp., 82 N.Y.2d at 164.

The New York Court of Appeal's decision in Northeast Gen is controlling law. Oppidan's reliance on Panarello v. Segallo, 6 A.D.3d 515 (2d Dept. 2004), and American Property Consultants, Ltd. v. Walden Lisle Assoc., 1997 WL 394617 (S.D.N.Y. 1997) is misplaced. Most importantly, in both cases the parties seeking compensation for their services **actually negotiated** the terms of the sales of real property,

In Panarello, co-defendant Vinchiarello sought compensation from co-defendant Segalla for services he rendered in connection with the sale of a business and real property. 6 A.D.3d at 516. The Court concluded that the dominant feature of the sale was its real estate based on the fact that: (i) Vinchiarello emphasized the undeveloped real estate potential of the transaction in his business plan; (ii) Vinchiarello negotiated the selling price; and (iii) "Vinchiarello himself testified that the final negotiations leading up to the sale included discussion as to how much total acreage would be included in the deal." Id. at 516-17. As a result of Vinchiarello's heavy involvement in the negotiation, because Vinchiarello did not have a valid real estate broker's license, Section 442-d prevented recovery of the fee for services rendered. Id. This is unlike here, where PrinceRidge was not involved in the negotiations whatsoever. Kirsch Decl. ¶¶ 10-11, 36; Kirsch Dep. I, 102:23-103:12, 163:9-15, 195:6-196:20.

Similarly, in American Property Consultants, the Court concluded that Section 442-d applied and plaintiff could not recover a fee for services it rendered because plaintiff admitted that it "assist[ed] [the] buyer in consummating the sale." 1997 WL 394617, *7. Unlike the defendant in Panarello and the plaintiff in American Property Consultants, PrinceRidge did not assist either Oppidan or NRP in consummating the sale of the Properties, nor was it involved in the negotiations between the parties; it merely made an introduction. The mere act of introducing potential buyers to Oppidan did not make PrinceRidge a "broker" for purposes of Section 442-d. See Northeast Gen. Corp., 82 N.Y.2d at 163-65. PrinceRidge's work was complete when it facilitated the introduction and exchange of information between Oppidan and NRP regarding the investment opportunity, and that exchange resulted in Oppidan entering into negotiations to consummate a deal with NRP. Therefore, PrinceRidge was a "finder" in this transaction. See Northeast Gen. Corp., supra, 82 N.Y.2d at 163. Because PrinceRidge fulfilled its obligations under the Exclusive Engagement Agreement and had no further involvement in the deal after introducing NRP to Oppidan for purposes of purchasing the Properties, PrinceRidge is entitled to the contractual fee set forth in the Engagement Agreement as a "finder" under New York law. See Northeast Gen. Corp., 82 N.Y.2d at 163, supra. As such, the Court should deny Oppidan's motion for summary judgment.

## II. OPPIDAN'S ATTEMPT TO HIDE ITS SALE OF THE PROPERTIES TO NRP FROM PRINCERIDGE CONSTITUTES THE "ADDITIONAL FACTS" NECESSARY TO SUPPORT PRINCERIDGE'S CLAIM OF OPPIDAN'S BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING.

Oppidan seeks summary judgment regarding PrinceRidge's claim for breach of the implied covenant of good faith and fair dealing based on two separate premises: (i) this cause of action is duplicative of the breach of contract cause of action; and (ii) the Exclusive Engagement Agreement is unenforceable. (Def. Br. at 14-15.) Both arguments fail.

PrinceRidge's cause of action for breach of the implied covenant of good faith and fair dealing is premised on the manipulative tactics used by Oppidan to avoid paying PrinceRidge for the services it rendered. NRP and Oppidan engaged in subversive actions in an attempt to consummate the transaction without PrinceRidge's knowledge to avoid paying PrinceRidge its contractual fee. Specifically, despite PrinceRidge's initial introduction to NRP of the opportunity presented by the properties, Oppidan sought to consummate the transaction with NRP without PrinceRidge's knowledge in order to avoid paying the Success Fee. (Pl. Moving Br., pp. 6-8.)

As part of its "Advisory Services," PrinceRidge originally contacted NRP in May 2010. (Id., p. 6.) Kirsch sent NRP the discussion materials and had multiple discussions with NRP's acquisitions department, specifically, Joshua Lewis, from May to June, 2010, regarding the Properties to determine if NRP had any interest in making an investment with Oppidan. (Id.) Lewis told Kirsch that NRP was, in fact, interested in some of the Properties, and that NRP intended to submit a bid. (Id., p. 7) Thereafter, based on his discussion with Lewis, Kirsch reached out to NRP's senior executive vice president, Jay Bastian, to continue the process. (Id.) However, the following day, Bastian emailed Kirsch to say that NRP would **not** "be participating in [PrinceRidge's] process." (Id.) Kirsch followed up with his initial contact at NRP, Lewis, and Ryan confirmed that NRP still intended to submit a bid for the Properties; however Kirsch never received one. (Id.) Rather, Kirsch subsequently learned that NRP's head of acquisitions was conveniently in Minnesota at or about that time meeting with Gander Mountain and Camping World, and after Kirsch introduced the Transaction to NRP, Oppidan then began working with NRP, behind the scenes and unbeknownst to PrinceRidge, in a deceitful attempt to sell the Properties to NRP and avoid paying PrinceRidge the Success Fee it contractually earned. (Id.) Through these subversive actions described above, Oppidan clearly breached the implied covenant of good faith and fair dealing.

Moreover, Oppidan cannot seriously argue that PrinceRidge was providing it real estate brokerage services when they knew from the outset that they were talking with PrinceRidge, a boutique investment bank, to specifically advise Oppidan on a course of action for its distressed Properties. Before even doing the work set forth in the Exclusive Engagement Agreement, PrinceRidge was **advising** Oppidan in an advisory capacity. Months prior to the Exclusive Engagement Agreement's execution, PrinceRidge developed and communicated to Oppidan three potential methods of resolving the financial issues Oppidan faced at that time: 1) refinancing the existing debt on the Properties; 2) renegotiating the loans on the Properties with existing lenders; or 3) the disposition of the Properties through sales by Oppidan. (See Kirsch I 16 – 17:18 - 5, 42:15-20; Ryan Dep. 34 – 35.) Ultimately it was determined that the third option, a sale of the Properties, was the best course of action. Ryan Dep. 35:14-15. It was only at that time that the parties negotiated and then entered into the Exclusive Engagement Agreement. Accordingly, PrinceRidge was clearly not acting as a real estate broker here. Oppidan cannot argue otherwise particularly in light of the fact that Oppidan did engaged actual real brokers, that Oppidan paid.

Further evidence that Oppidan knew it was engaging a financial advisory as opposed to a real estate broker was memorialized in Paragraph 6 of the Exclusive Engagement Agreement. Paragraph 6 provides, in relevant part, as follows:

> **Other Matters; Conflicts of Interest**. [Oppidan] acknowledges that PrinceRidge and entities related to or affiliated with PrinceRidge are actively involved in a wide range of real estate finance and investment activities on account of other customers and clients of PrinceRidge. Such activities include financing and banking services, advisory services with respect to real estate to other customers and to fiduciary accounts and acquisitions and disposition of real property. . .[Oppidan] hereby acknowledges that nothing in this Agreement prohibits or limits in any manner whatsoever such activities and functions of PrinceRidge.

Paragraph 6 makes clear that Oppidan fully understood that PrinceRidge was providing financial advisory services to Oppidan by virtue of the fact that Oppidan waived any conflicts between its interests and PrinceRidge's other clients. This language does not even remotely exist in Oppidan's actual Brokerage Agreements. The reason is obvious. As a sophisticated real estate developer, Oppidan knows full well that a real estate broker **cannot** serve clients who's interest conflicts with the seller's interest. Accordingly, Oppidan's entrance into the Exclusive Engagement Agreement confirms that Oppidan understood that PrinceRidge was to provide it with financial advisory services only. For Oppidan now to assert the premise that PrinceRidge acted as a real estate broker merely to avoid paying the compensation that PrinceRidge earned is further evidence of Oppidan's breach of the implied covenant of good faith and fair dealing.

Lastly, for the reasons stated in Section I.A. supra, PrinceRidge acted as a "finder" under New York law and did not fall within the confines of Section 442-d of the Real Property Law.

As such, the Exclusive Engagement Agreement is enforceable, and Oppidan's motion for summary judgment regarding the Second Cause of Action must fail.

## CONCLUSION

The parties do not dispute the material facts related to Oppidan's failure to fulfill its obligations under the Exclusive Engagement Agreement despite PrinceRidge's performance thereunder. Oppidan's motion is nothing more than a continued attempt to conduct an end around a contract that PrinceRidge performed in good faith, which resulted in a windfall to Oppidan. The Court should not condone Oppidan's actions. For the foregoing reasons and authorities, the Court should deny Oppidan's motion for summary judgment in its entirety.

DATED: New York, New York
April 8, 2013

Respectfully submitted,

COLE, SCHOTZ, MEISEL,
FORMAN & LEONARD, P.A.
A Professional Corporation
Attorneys for Plaintiff The PrinceRidge Group LLC

By: /s/ Leo V. Leyva
Leo V. Leyva
Jed M. Weiss
Cole, Schotz, Meisel,
Forman & Leonard, P.A.
A Professional Corporation
900 Third Avenue, 16th floor
New York, NY 10022-4728
(212) 752-8000